Office of Administrative Law Judges

WASHINGTON, D.C.

U.S. DEPARTMENT OF JUSTICE

IMMIGRATION AND NATURALIZATION

SERVICE, WASHINGTON, D.C.

Respondent

and Case No.

AMERICAN FEDERATION OF GOVERNMENT WA-CA-70267

EMPLOYEES, NATIONAL BORDER PATROL COUNCIL

Charging Party

B. Virginia Comella

Representative of the Respondent

Deborah S. Wagner, Esq.

T. J. Bonner

Representatives of the Charging Party

Thomas F. Bianco

Counsel for the General Counsel, FLRA

Before: GARVIN LEE OLIVER

Administrative Law Judge

DECISION

Statement of the Case

The unfair labor practice complaint alleges that the Respondent violated section 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute), 5 U.S.C. §§ 7116(a)(1) and (5), by changing working conditions of bargaining unit employees through (1) training bargaining unit employees in the collapsible steel baton in December 1996 and (2) implementing a non-deadly force policy on or about February 10, 1997, without completing bargaining with the Charging Party (Union) and while negotiable proposals were still on the table.

Respondent contends that it did not change conditions of employment or fail to bargain in good faith as it has conducted training classes in the collapsible steel baton since April 1995 and did not implement a non-deadly force policy in early 1997. Respondent claims that a revised non-deadly force policy was proposed in late 1997 and bargained on in good faith in 1998.

For the reasons explained below, I conclude that a preponderance of the evidence does not support the alleged violation and recommend that the complaint be dismissed.

A hearing was held in Washington, D.C. The parties were represented and afforded full opportunity to be heard, adduce relevant evidence, examine and cross-examine witnesses, and file post-hearing briefs. They filed helpful briefs. Based on the entire record(1), including my observation of the witnesses and their demeanor, I make the following findings of fact, conclusions of law, and recommendations.

Findings of Fact

The American Federation of Government Employees (AFGE) is the exclusive representative of a nationwide unit of employees appropriate for collective bargaining at the Respondent. The Charging Party, AFGE, National Border Patrol Council (NBPC or Union), is an agent of AFGE for representing unit employees at the Respondent's U.S. Border Patrol.

On or about August 14, 1995, the Respondent sent the Union a document entitled, "Enforcement Standard: Use of Non-Deadly Force." On September 15, 1995, the Union submitted to the Respondent a request to bargain and bargaining proposals concerning the subject raised in the document. On

June 25 and 26, and October 23, 1996, representatives of the Respondent and representatives of the Union bargained in connection with the subject, but did not reach a final agreement.

On or about February 10, 1997, the Respondent, by Edwin S. Campbell, Jr., Labor and Employee Relations Policy Section, sent the Union a document, marked "10-24-96 Draft," entitled, "Enforcement Standard: Use of Non-Deadly Force" that differed from the August 14, 1995 document. A cover letter accompanying the document stated that the document was the final revisions on the enforcement standards; that "[a]fter negotiations lasting over one year in length, we must implement;" that, "all impact and implementation issues have been fully bargained and agreed upon;" and "it is our intent to implement these new standards;" that the standards specified in the document would go into effect as soon as employees were trained; and that training of employees in the use of equipment identified in the document would begin immediately. The draft had a notation at the end entitled "Approval of Standard," providing for a date and the signature of the Commissioner, INS, but it was undated and unsigned.

By letter to the Commissioner, INS, dated February 25, 1997, the Union protested the notice, stated that bargaining had not been completed on a number of unresolved issues, including the training provided for non-deadly force devices and the effect of a failure to recertify with non-deadly force devices. The Union enclosed a copy of the unfair labor practice charge in the instant case which was filed the same date.

Despite the February 10, 1997 letter to the Union, there was no implementation of the draft sent to the Union. No "Enforcement Standard: Use of Non-Deadly Force" developed in 1996 was ever issued or signed by the Commissioner, INS, allowing it to be put into effect.[(2)]

Mr. T. J. Bonner, President of the Union, testified that at the time he received the February 10, 1997 letter from Mr. Campbell, he was not aware of anyone having received training in the use of the collapsible steel baton. After filing the charge on February 25, 1997, he learned that a group of employees had been trained in the collapsible steel baton or ASP[(3)] and secured a list of Border Patrol participants in a ASP instructor certification seminar held in Spring Valley, California on December 18-19, 1996. (General Counsel Exh. No. 8).

The Respondent proved that the same training in the collapsible steel baton or ASP has been conducted since April 1995. Respondent provided additional lists of Border Patrol class participants, including some bargaining unit employees, who were in ASP instructor certification seminars held on eight occasions prior to the December 1996 session, namely in April, June, July, and September 1995, and April, June, and September 1996. Six of the sessions were held at the U.S. Border Patrol Academy, Glynco, Georgia (Academy). Jeffrey Everly, a member of the

Union's bargaining team, was a participant in the April 18, 1996 session. He participated on behalf of the Union to explore the use of the collapsible steel baton. Thus, I conclude that the Union had knowledge of this training.

According to Kevin LeVan, a supervisory Border Patrol agent and Academy instructor, whose testimony I credit, participants for the training were solicited by the Academy and selected by the Border Patrol sectors throughout the country. Participants were given eight hours of training in the collapsible steel baton. They were told that, even though they were trained and certified, they were not to use the device until there was a policy from headquarters.(4) Training was started for research and development purposes prior to a policy being issued. The lesson plan for the course had been in development and modification since 1994. If instructors were not trained prior to issuance of the policy, it would take much longer to implement the policy once issued, possibly six months longer or more.

Discussion and Conclusions

Section 2423.32 of the Rules and Regulations, 5 C.F.R. § 2423.32, based on section 7118(a)(1) and (8) of the Statute, provides that the General Counsel shall "have the burden of proving the allegations of the complaint by a preponderance of the evidence." Under this standard, the unfair labor practice complaint filed in this case must be dismissed. The Respondent did not implement a non-deadly force policy on or about February 10, 1997. Therefore, there was no change in working conditions in this respect, as alleged. The Respondent also did not change working conditions by implementing the non-deadly force policy by training bargaining unit employees in the collapsible steel baton in December 1996, as alleged. The December 1996 training was merely a continuation of existing training given since April 1995 and was no different from what previously existed so as to constitute a change in conditions of employment. *92 Bomb Wing, Fairchild Air Force Base, Spokane, Washington*, 50 FLRA 701 (1995).

In view of this disposition, there is no need to address the additional claims and defenses of the parties.

Based on the above findings and conclusions, it is recommended that the Authority issue the following Order:

ORDER

The complaint is dismissed.

Issued, Washington, DC, January 5, 1999

GARVIN LEE OLIVER

Administrative Law Judge

1. The Respondent's post-hearing motions to submit, as Respondent's Exhibit No. 11, a November 16, 1998 letter

from the Federal Service Impasses Panel (FSIP) and, as Respondent's Exhibit No. 12, an agreement on implementation dated December 17, 1998, are granted.

2. I credit the testimony to this effect of William S. Jumbeck, Assistant Chief, U.S. Border Patrol, who is in a position to know the status of the enforcement standard. Mr. Jumbeck, since the end of February 1997, has been the program manager overseeing matters concerning the non-deadly force devices of the collapsible steel baton and oleoresin capsicum (OC) spray and has been involved in negotiations for the non-deadly force policy. The record reflects that Respondent sent the Union a revised draft of a "Enforcement Standard: Use of Non-Deadly Force" on October 21, 1997 which was in lieu of the previous draft. The Union requested negotiations which were held in February, April, and June 1998. INS requested the assistance of the Federal Services Impasses Panel in July 1998. On November 16, 1998, the Panel declined to assert jurisdiction over an issue concerning the memorialization of the parties' agreement on the enforcement standard until obligation to bargain issues were resolved. The Panel determined to assist the parties further concerning other outstanding issues, including the use of OC spray. In an apparent response to the Panel's ruling and its' additional assistance, the parties agreed on December 17, 1998 to immediate implementation of the collapsible steel baton and further agreed that INS will not expose any bargaining unit employees to OC spray pending Panel resolution of that issue.

3. The collapsible steel baton is sometimes called an "ASP," which is also an acronym for the manufacturer, Armament Systems and Procedures, Inc. of Appleton, Wisconsin.

4. An issue was raised at the hearing with respect to post-charge and post-complaint implementation of the collapsible steel baton at the Respondent's San Diego sector in about December 1997. The evidence on that issue was only to be considered in determining the remedy if a violation were found. Inasmuch as no violation is found, and no *status quo ante* is being sought, the issue will not be dealt with in detail. If it were deemed necessary to do so, I would find that the implementation in the San Diego sector was not authorized by the national office of INS or the Academy. The Union local specifically advised management of the San Diego

sector that it could not agree to the local implementation; that implementa-tion was being addressed at the national level. However, the Union local indicated that, apart from these considerations, it had no objection to the specifics of the local policy concerning the collapsible steel baton as it mirrored the previous policy relating to the side handle baton.